

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

BARRETT GREEN, : Civil Action No.
Plaintiff, : PJM 13-1961
v. :
PRO FOOTBALL, INC., : Greenbelt, Maryland
et al., :
Defendant. : Monday, November 25, 2013
10:15 A.M.

TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

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11 COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES
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THE DEPUTY CLERK: The matter now pending before this Court is Civil Number PJM 13-1961, Barrett Green versus Pro-Football, Inc., et al. The matter comes before the Court for a motions hearing.

THE COURT: All right. Counsel, identify yourselves for plaintiff and then for defendants.

MR. MILES: Good morning, Your Honor. Seth Miles, Mike McAllister and Bruce Plaxen for plaintiffs.

MR. FERGUSON: Morning, Your Honor. Robert Ferguson and Craig Ballew for the defendants. And also at counsel table with me is Eric Shaffer, General Counsel for The Washington Redskins, and Robert Forbes.

THE COURT: All right. We're going to call them the Washington Football team hear in this court. Have a local rule that tell us about the way words are used. No need to get into a big political issue with you on that. For now, that's what we'll call them.

All right. Let me address something first. I think the issue of preemption needs to be addressed first, because that's a jurisdictional issue, before we start talking about any state causes of action. So, however you've argued it, I think that's where we are in terms of the case. So, if you want to go forward. I don't know who is going to argue for the defendants.

I gather you're going to argue collectively for

1 defendants or are you going to split the argument. How are you
2 going to do that?

3 MR. FERGUSON: I'm going to argue the Statute of
4 Limitations issue and Mr. Ballew will argue the preemption
5 issue.

6 THE COURT: All right. Let's start with the
7 preemption issue.

8 MR. BALLEW: Thank you, Your Honor.

9 Your Honor, Craig Ballew on behalf of the defendants.

10 Your Honor, we're here on a series of issues. The
11 issue that I will address is the question of Federal Preemption
12 under Section 301 of the Labor Management Relations Act. It is
13 an issue that frequently comes up when parties are dealing with
14 disputes involving the Collective Bargaining Agreement.

15 This is a case in which there is a Collective
16 Bargaining Agreement. Mr. Green signed a players' contract. He
17 was a member of the union. There is a Collective Bargaining
18 Agreement between the Management Council and the Players
19 Association. They were his representatives. They negotiated
20 the terms of that Collective Bargaining Agreement and it is what
21 he operated under while he was an employee within the NFL.

22 When we look at the question of contractual or tort
23 claims under state theories and whether they are preempted, we
24 begin by reviewing the Supreme Court analytical framework. The
25 Supreme Court has since the early 1960's been dealing with the

1 question of Section 301 Federal Preemption, the role of Federal
2 Labor Law and the role of the arbitrators to decide Federal
3 Labor Law.

4 In 1962, in the *Lucas Flour* case, they made it clear
5 that a contract claim, which was predicated upon a Collective
6 Bargaining Agreement could not be brought under state law. They
7 expanded on that in the early 80's through the early 90's,
8 beginning with the *Allis-Chalmers v. Lueck* case. That is a case
9 that involved Mr. Lueck. He had what we call a non-occupational
10 injury to his back.

11 Apparently, he was visiting a pig roast and he carried
12 the pig to the pig roast. He injured his back. He worked for
13 an employer who had disability benefits. Fortunately for him,
14 they included non-occupational benefits. They were a benefit
15 under the terms of the Collective Bargaining Agreement.

16 He applied for and received benefits. His assertion
17 was that periodically his employer would call upon the carrier
18 to cut off those benefits improperly. He did not file a
19 grievance. He filed a state suit in Wisconsin courts arguing
20 that the disability claim and the administration of the claim
21 was not being dealt with in good faith and fairly.

22 That is an issue that the Wisconsin Courts addressed.
23 Their conclusion was, it was not preempted. When the issue went
24 to the Supreme Court, Judge Blackmun, Justice Blackmun reviewed
25 the prior cases and he framed the discussion of this tort issue

1 within the parameters of Section 301. He made it clear,
2 questions relating to what the parties to a labor agreement
3 agreed and what legal consequences were intended to flow from
4 breaches of that agreement must be resolved by reference to
5 uniform federal law, whether such questions arise in the context
6 of a suit for breach of contract or in a suit alleging liability
7 in tort.

8 He went on to note that the Court's analysis needed to
9 focus on whether evaluation of that tort claim was inextricably
10 intertwined with consideration of the terms of the labor
11 contract. If the state court law purports to define the meaning
12 of the contractual relationship, he indicated it was preempted.

13 He went on to note that the mistake made by the
14 Wisconsin Courts was first making the assumption that because
15 something was not expressly laid out in the Collective
16 Bargaining Agreement, that therefore they had the right to
17 determine whether implicitly an obligation existed under that
18 document. That was the analysis of the Court, the Supreme Court
19 of Wisconsin. That is what the Supreme Court of the United
20 States said was flawed.

21 In looking at this, he also noted that the underlying
22 State Supreme Court analysis was harmful because it took away
23 under the terms of the Collective Bargaining Agreement the
24 federal right of the parties to discernment who would decide
25 their contract disputes. That is at the core of protecting the

1 role of the arbitrator under Federal Labor Law, specifically
2 under Section 301.

3 A few years later in the *Rawson* decision, a case
4 involving a tragic fire in a mine, claims were brought by
5 deceased minor survivors arguing that in this case the union had
6 violated certain standards. It was a wrongful death action.
7 Justice White reviewed the decision of *Allis-Chalmers*, again
8 restated that state law action is preempted if the duty to the
9 employee of which the tort is a violation is created by the
10 Collective Bargaining Agreement and without existence
11 independent of the agreement.

12 In that case, the state of Idaho had determined that
13 the wrongful death claim predicated on a duty to inspect the
14 mine was independent of the Collective Bargaining Agreement.
15 Justice White found that to be incorrect; that indeed, the
16 union's obligation to conduct an inspection was a product of the
17 Collective Bargaining Agreement. And, therefore, if there was a
18 violation, one had to look to the Collective Bargaining
19 Agreement to make that determination. Remedies available for
20 that violation would be under federal law, not under state law.

21 The Fourth Circuit has in several decisions taken and
22 applied these standards. The parties have cited to the
23 *McCormick* decision, an AT&T case involving an individual who was
24 let go, his locker was opened, his materials were removed, his
25 personal belongings were put in the trash.

1 He brought, again, a claim under state, Virginia state
2 law, not a grievance under the Collective Bargaining Agreement,
3 even though he was a union member. The case was removed to
4 federal court, preemption argument was made, summary judgment
5 was granted. And when the Fourth Circuit looked at the issue
6 for purposes of analyzing preemption, they said that the
7 question is whether resolution of the cause of action requires
8 interpretation of a Collective Bargaining Agreement.

9 Rightness or wrongness of cleaning out that locker was
10 not committed to the common law of the tort, but to the legal
11 arrangements of the Collective Bargaining Agreement, the
12 agreement between the parties.

13 It went on to note, again, management's rights and
14 obligations aren't always expressly delineated in a contract.
15 And it referred back to the *Warriors versus Golf Navigation*,
16 Supreme Court decision of 1960, noting that a CVA is more than a
17 contract. It's a generalized code of conduct and it governs
18 many cases, including those that the draftsmen might not have
19 considered at the time they were drafting.

20 More recently in 1993, the Fourth Circuit looked at
21 the issue again in *Jackson versus Kimel*. Again, AT&T was one of
22 the defendants. This was a case in which an individual claimed
23 that there was coerced sex in return for job benefits. AT&T was
24 ultimately dismissed, because the underlying claims were found
25 to be insufficient.

1 The Fourth Circuit looked at the claim against Mr.
2 Kimel, however, and found that it was not insufficient and that
3 it was not preempted. In reaching that conclusion, they looked
4 at the fact that coerced sex in exchange for benefits was
5 something that was impermissible under Title VII of the Civil
6 Rights Act of 1964; was impermissible under the public policy of
7 North Carolina. And as the Fourth Circuit noted, it was
8 possibly also a violation of state criminal law. They concluded
9 that they did not need to interpret the Collective Bargaining
10 Agreement in order to determine if the duty to refrain from
11 certain conduct existed.

12 When we turn from those cases and we look at the
13 claims that the plaintiff in this case is making, we begin with
14 the complaint. It is clear from a review of the complaint what
15 the plaintiff is alleging.

16 In Count One, there is a claim against Defendant Royal
17 for battery. Paragraph 49, he makes it clear, plaintiff in no
18 way consented to described contact by Defendant Royal, which was
19 outside the rules of the game. That's the language of the
20 complaint.

21 Count Two, paragraph 58, players were encouraged and
22 even compensated for playing outside the rules of the game.

23 Count Three, negligence. Paragraph 65, Royal had a
24 duty to play the game of football in a manner that was
25 consistent with the rules as set forth by the NFL.

1 And in paragraph 68, Defendant Royal breached his duty
2 to plaintiff by blocking plaintiff in violation of the
3 applicable NFL rules.

4 Count Four, Five and Six go on to make the same
5 references to the existence of a duty and violations of the
6 rules, conduct outside the rules of the game. When we look at
7 this complaint, we see it clearly asserts that there was a duty,
8 a duty to act and a duty to refrain from acting in a certain
9 manner. That is expressly tied to the NFL's rules. These
10 violations are what the complaint says reflect the defendant's
11 breaches of the duties, the violations of the rules or the
12 breaches of the duty.

13 THE COURT: Well, is the duty here the duty to abide
14 by the rules or is there -- well, what does it say about, and
15 assume it's true for present purposes, a football organization
16 directing somebody to go out and try to cripple somebody else?
17 Is there a duty not to do that? Is that in the rules?

18 MR. BALLEW: That would be a violation of the NFL
19 rules.

20 THE COURT: Well, is it? Now, the issue is, can a
21 team pay a bounty to a player to the extent that the player can
22 deliberately injure another player as opposed to simply going
23 out and playing hard or even playing dirty?

24 MR. BALLEW: When the plaintiff tries to characterize
25 this as a bounty system that is somehow an apparently

1 inappropriate action, what they're doing is they're really
2 saying, this is a violation of our existing NFL rules. And
3 those NFL rules are expressly referenced in both the
4 constitution and bylaws. They are also a part of the player's
5 contract and they are a part of the Collective Bargaining
6 Agreement, which the players contract is a part of.

7 This is not a situation where we can look outside the
8 terms of the relationship on the field and in this institution
9 to determine the social boundaries. The effort is being made by
10 the plaintiff to run away from his own complaint. And part of
11 that argument is that this is somehow outside the rules, outside
12 the Collective Bargaining Agreement and fitting within this
13 narrow exception like the coerced sex for job --

14 THE COURT: I don't think the plaintiff is saying,
15 it's outside the rules in the sense that the rules may not
16 provide a standard of measurement. But are you saying, ipso
17 facto that makes the Collective Bargaining Agreement applicable
18 just because there a reference to the rules?

19 MR. BALLEW: No, the cases recognize there has to be
20 something more than a tangential reference to the Collective
21 Bargaining Agreement. Now, the Supreme Court and the Fourth
22 Circuit have made that clear. So we're not here saying that
23 simply because there is a Collective Bargaining Agreement,
24 therefore there must be preemption.

25 But when you look at this complaint and what is being

1 argued, the source of the duties is the obligations under the
2 rules, the contract, the Collective Bargaining Agreement. And
3 the arguments being made, I can, I can separate from that and
4 say that there is a duty that this player and this team owe to
5 everyone in the world. And that, I would submit, is not
6 accurate.

7 What we have to look at are the standards applicable
8 when players take the field and play football in the NFL. There
9 is physical contact. It is violent physical contact. The rules
10 define when that violent physical contact is within the rules
11 and outside the rules. The premise that we can put those rules
12 and the contract aside, and go to outside tort standards to
13 determine duty would suggest that every time there is contact on
14 the field, we have the potential for a claim being made separate
15 from the Collective Bargaining Agreement.

16 THE COURT: Well, go back to my question. Is the
17 issue that the block was illegal or is the issue that a bounty
18 was paid to try and deliberately injure somebody? I mean, I
19 think that's the distinction the plaintiff is trying to make
20 here. If this were just an illegal block under the rules,
21 you're probably right. I mean, there's not much to talk about.

22 But he's saying, late in the game I discovered that --
23 if in fact it's true. I don't know at this point -- that the
24 team was actually playing players to go out and try and cripple
25 other players. That's what the essence of the claim is here;

1 not that a rough, injurious block was -- well, that's part of
2 it, obviously, but that's not the core. At least, that's the
3 way I read the plaintiff's complaint.

4 MR. BALLEW: And I would submit that, again, when he
5 makes that argument, what he's trying to do is say that
6 something that is predicated on a violation or a non-violation
7 of rules can be analyzed separate from those rules in a
8 different context.

9 THE COURT: Let me ask you a question. Suppose on the
10 way into the stadium on the day of the game one player walked
11 over and punched another player in the face, and knocked him
12 cold and created injury. Would that be covered by your
13 analysis?

14 MR. FERGUSON: The NFL's constitution and bylaws have
15 very specific language and it's attached as an exhibit. And let
16 me just find that language for you.

17 First of all, in Section 9.3 of the --

18 THE COURT: Collective Bargaining Agreement or --

19 MR. FERGUSON: This is the constitution and bylaws.
20 Section 9.3, there is a reference to the fact that every
21 contract with an employee of the league or a club therein shall
22 contain a clause wherein the employee agrees to abide and be
23 legally bound by the constitution and bylaws, and the rules and
24 regulations of the league, as well as by the decisions of the
25 commissioner which decision shall be final, conclusive and

1 unappealable.

2 In addition to that, in Section 8.3, the jurisdiction
3 of the commissioner is laid out in Section 8.3. And in 8.3(C),
4 any dispute between or among players, coaches and/or other
5 employees of any member club or clubs of the league, other than
6 disputes unrelated to and outside the course and scope of
7 employment of such disputants within the league.

8 So to your question or to begin, the facts of this
9 case are clearly disputes in the course and scope of employment.
10 They're on the field. They are playing football. There is
11 contact.

12 Your hypothetical speaks to what may or may not be
13 inside or outside the scope of employment of the disputants. By
14 your description, they're in the stadium, the game hasn't
15 started.

16 THE COURT: Well, let's change the hypothetical. He
17 pulls out a knife during the game and stabs somebody on the
18 other team. Games on, field is in play, what's about that? Can
19 a player -- would that be within the Collective Bargaining
20 Agreement?

21 MR. FERGUSON: Obviously, that's not the situation
22 we're dealing with here.

23 THE COURT: Well, that's your argument. The question
24 is, is it more like one rather than the other.

25 MR. FERGUSON: I would submit to you that that's more

1 like the *Brown* case where the referee threw the flag, and the
2 analysis of the Court, which reached the conclusion it was not
3 preempted, was that that referee owed that same duty in throwing
4 that flag to players and fans in the stadium. Therefore, they
5 didn't have to look to the terms of the Collective Bargaining
6 Agreement.

7 In your hypothetical, that same argument could
8 presumably be made. Within our facts, what we have are two
9 players engaged in contact. There is a crack block and there is
10 a penalty. And the rules speak to that type of violation. The
11 rules, again, are something employees through their contract
12 have agreed to abide by. Their contract is an appendix to the
13 Collective Bargaining Agreement, and the parties have a document
14 that specifically expresses what is covered by the grievance
15 arbitration procedure. It is an extremely broad clause. The
16 plaintiffs try and narrow it.

17 Article IX, Section 1, this is -- although we are
18 dealing with unique employees, we are not dealing with a unique
19 Collective Bargaining Agreement. This is a classic grievance
20 arbitration provision and it begins by defining what is a
21 grievance. And it says, if it's a grievance, it will be
22 resolved exclusively in accordance with the procedures set forth
23 in this article, accept where another method of dispute
24 resolution is set forth elsewhere in the agreement.

25 What is the definition? Any dispute, any dispute

1 arising after the execution of this agreement that involves
2 interpretation of, application of or compliance with any
3 provision of the agreement, the NFL player contract or any
4 applicable provision of the NFL constitution and bylaws
5 pertaining to terms and conditions of employment of NFL players.

6 So, when we look at a rule violation and we look at
7 this grievance clause, we see any dispute, interpretation,
8 application, compliance. We have a rule here, a contract that
9 speaks to the rules here and we have a Collective Bargaining
10 Agreement that speaks to it.

11 THE COURT: Do we agree that with regard to the state
12 causes of action that Maryland law applies?

13 MR. FERGUSON: I'm sorry. I didn't hear.

14 THE COURT: Do we agree that with regard to the state
15 cause of action that Maryland law applies, assuming we're
16 setting aside for a moment the Fair Labor Management Act,
17 Federal Labor Relations Act.

18 MR. FERGUSON: State laws of Maryland versus --

19 THE COURT: Anywhere else? It's Maryland law, right?
20 The state causes of action, is it Maryland law we're talking
21 about?

22 MR. FERGUSON: Plaintiff, as I understand, has framed
23 its claims based on the state of Maryland tort claims.

24 THE COURT: Let me put the question to you this way:
25 Would it be legal under Maryland law to have any kind of a

1 clause that gave, that made someone waive their right to a jury
2 trial, put absolute authority to determine to some arbitrator
3 without being able to go to court? That is, if the provision
4 would say, even if you are deliberately injured in the course of
5 your practice by someone, you're waiving any right to file any
6 claim, you must go through a grievance proceeding. Would that
7 be legal under Maryland law?

8 MR. FERGUSON: Let me answer that in beginning by
9 making clear the nature of the relationship.

10 Mr. Green was a member of the union. The union had a
11 contract with the association. So can a union enter into an
12 agreement which requires individuals with their claims to bring
13 those claims under arbitration versus under a state --

14 THE COURT: Is it just under arbitration or are you
15 waiving any -- you just read some exclusive language that it's
16 solely and exclusively the commissioner who can decide this
17 issue, that there's no recourse beyond that. That's what you've
18 said.

19 MR. FERGUSON: And that is at the essence of why since
20 the 1960's the Supreme Court has been recognizing and protecting
21 the role of the arbitrator, because prior to those decisions
22 there was an antithesis on part of some courts to recognize the
23 role of an arbitrator to make these decisions.

24 And in the early 1960's the Supreme Court recognized,
25 no, we need to recognize under the Federal Labor Law it is the

1 arbitrator. We cannot have state courts addressing these
2 issues. We need to have the arbitrators, because this law has
3 given these parties the right to agree that we will have our
4 disputes addressed by this person.

5 THE COURT: And you're saying -- this may be true
6 under Maryland law. I don't know whether you would say it's
7 true under federal law, but under Maryland law you can't waive
8 away your right to sue when there's gross negligence, for
9 example, in a landlord tenant case. It's just illegal, that
10 clause, even though landlords have tried to write it into the
11 contracts, the courts in Maryland say, it can't be done. You
12 can't excuse your own gross negligence or by a step forward your
13 intention to injure someone. And I ask whether that has been
14 applied in any Collective Bargaining Agreement context under
15 the, to get this right, the Federal Labor Management Relations
16 Act?

17 MR. FERGUSON: It has. And I have to apologize, but I
18 we can get you the citation. But a few years ago the Supreme
19 Court addressed the issue of whether or not an individual under
20 the age discrimination employment act had a right to pursue that
21 claim notwithstanding the existence of a Collective Bargaining
22 Agreement.

23 That Collective Bargaining Agreement said, if an
24 individual who is a member of the union has this type of a
25 claim, they must bring it through arbitration. The argument was

1 made that that was void as against public policy. That Title
2 VII in the ADEA recognize the independent right to bring that
3 cause of action, including bringing it to a jury.

4 The Supreme Court looked at that issue, recognized we
5 have Title VII principles on one hand, but that we had to also
6 take into consideration the National Labor Relations Act and
7 Section 301. And the determination was made in that case that,
8 in fact, the union had the right to enter into that agreement
9 and the employee was bound by that agreement, which required
10 that that type of a dispute not go to a jury, but go to an
11 arbitrator. And I apologize, I don't have it at the top of my
12 head.

13 THE COURT: I'm not sure it disposes of the
14 intentional injury issue, but it's an interesting argument.

15 MR. BALLEW: As I said, this begins and I would submit
16 really ends with the complaint, and the discussion of the duties
17 and where those duties come from, because when you take the
18 Supreme Court decisions, when you take the Fourth Circuit
19 decisions, you recognize this isn't tangentially tied. This is
20 going directly to the rules. The rules are at the core of the
21 relationship between the parties. When they're on the field,
22 what is permissible, what is not permissible.

23 And the suggestion that we should, as the plaintiff
24 has done since hearing the Motion for Summary Judgment, ignore
25 those rules is something that we would submit should not be

1 accepted by the Court.

2 Again, the response of the plaintiff in this situation
3 when the motion was filed was to begin by running away from his
4 own allegations. At pages 9 and 10, suddenly these rules,
5 suddenly the source of the duty become something that is a mere
6 recital of normal conduct within the league.

7 That argument can't withstand review. These
8 allegations decisively confirm that the rules, the contract are
9 inextricably intertwined with this dispute. Mr. Green cannot
10 avoid the consequence of these pleading admissions.

11 He cites to cases that are distinguishable. We
12 mentioned one, *Brown Hendy*, the other decision involved the
13 doctor's failure to treat the player's condition properly.
14 Those are different and clearly they involve situations where
15 the duty that was owed was owed to everyone. A doctor's duty to
16 treat someone properly is not a product of the Collective
17 Bargaining Agreement. That's the analysis that those courts
18 reached.

19 The *Hackbart* decision which they cite, first of all,
20 preceded all of the Supreme Court analysis. It's a trial court
21 decision from 1977. So, you know, years later we get
22 *Allis-Chalmers*, we get *Rawson*, we have other decisions. I would
23 submit to you that the *Hackbart* decision is wrong for a number
24 of reasons, including the fact that it ignores the Supreme Court
25 admonition against making the assumption that because something

1 is not expressly in the agreement, that therefore it isn't
2 explicitly an obligation.

3 Again, that is where, according to the *Lueck* decision,
4 the Wisconsin Court got it wrong. That is where, according to
5 *Rawson*, the Idaho Courts got it wrong.

6 This is not like a coerced sex for job benefits or
7 false imprisonment under threats of shaming by walking someone
8 past peers handcuffed. The appropriate standard for blocking
9 opposing players is not a matter of intrinsic moral import. The
10 standards on the field cannot be found by looking to public
11 policy. It is a violent game. That's why there are rules.

12 THE COURT: You keep talking about that. I haven't
13 heard anything about the bounty. I mean, I gave you the benefit
14 of the argument for a bit saying, sure, that's rough play. But
15 the issue here, isn't it, is that allegedly the team was paying
16 bonuses to people to deliberately injure, not to play dirty. I
17 mean, some players play dirty, we know that, but they were being
18 paid to play dirty. This is the allegation.

19 MR. FERGUSON: It's the allegation, which of course
20 we've noted we --

21 THE COURT: Well, of course, I know you dispute it,
22 but that's really where I'm -- I think we're looking at that
23 issue now that, yes, sure, the rules require you to only have
24 certain kinds of blocks that you put on. You don't have this
25 crack back block that's illegal and so on. And it was called, I

1 guess, at the time, was it not, that this was an illegal act and
2 it was penalized?

3 MR. BALLEW: Yes.

4 THE COURT: Well, all right. I want to see what
5 plaintiff has to say about that and I'll give you a chance to
6 rejoin then, all right.

7 MR. BALLEW: Thank you.

8 THE COURT: Mr. Miles then, yeah.

9 MR. MILES: Thank you, Your Honor.

10 Your Honor, the preemption argument is really based on
11 a fundamental misunderstanding of the gravamen of the complaint.
12 As I think the Court pointed out, the gravamen of the complaint
13 is that, in fact, there was this Bounty Program, which was a
14 program designed to pay players to intentionally injure other
15 players. And because that, in fact, is the gravamen of the
16 complaint, this complaint comes outside what the CBA says or
17 even could say.

18 And the answer, quite frankly, to both their
19 hypotheticals, whether or not in one instance as a player
20 punched another player on the way into the game or if a player
21 took a knife out during the middle of the game and stabbed
22 someone, which is somewhat analogous to what we have here, both
23 those would be outside of preemption for a very simple reason.

24 And the reason comes to us from the *Brown* case, which
25 was cited in the Southern District of New York, 2002. And I'm

1 going to read from what *Brown* says. *Brown* says, and I quote,
2 Courts of Appeals have frequently held that claims of
3 intentional torts like assault or battery, *parens*, that's what
4 we've alleged here, brought by employees covered by CBAs against
5 fellow employees are not preempted by Federal Labor Law.

6 It continues, "Thus, if *Brown* claimed that Triplett
7 had intentionally thrown the flag at him, the resulting battery
8 claim would surely survived any assertion of federal
9 preemption." So what the *Brown* Court is saying, citing other --
10 citing some Circuit Courts of Appeal, is that an intentional
11 tort which is what the Bounty Program is alleged to be in our
12 complaint, simply comes outside the CBA.

13 And it comes outside the CBA irrespective of any
14 language for a very simple reason. And that comes from this
15 Court's opinion in the *Smith v. Giant Food* case. It's Tab
16 Number 12 in our binder. What the *Smith* case says and the *Smith*
17 case is concerning a false imprisonment allegation. It says,
18 Maryland Tort Law and Criminal Law both prescribe false
19 imprisonment.

20 Maryland law clearly reflects the public policy
21 against physical detention of an individual without legal
22 justification and makes the conduct a matter of intrinsic moral
23 support. It continues on and says, citing the Supreme Court
24 opinion is *Lueck* that, therefore, Section 301 does not grant the
25 parties to a Collective Bargaining Agreement the ability to

1 contract for what is illegal under state law.

2 THE COURT: Well, that's what I was driving at.

3 MR. MILES: And there is no question, it is illegal
4 under state law to commit a battery. It would be illegal under
5 state law to have a Bounty Program that payed players to commit
6 battery for the purpose of injuring opponents. Because the
7 gravamen of the complaint is that intentional tort, which
8 corresponds with criminal conduct, the CBA in this case, even if
9 it tried to cover these claims and I'll argue that it doesn't,
10 but even if it did, it would fall outside of the scope of what
11 could conceivably be preempted because of the type of
12 allegations in this complaint.

13 The *Jackson* case, which is Tab 9, Fourth Circuit case
14 from 1993, makes that again very clear. Quoting from the
15 *Jackson* case, it says, in this case, interpretation of the
16 Collective Bargaining Agreement is not necessary to determine
17 whether *Kimel* owed a duty to refrain from the alleged conduct.
18 The Collective Bargaining Agreement could not authorize his
19 alleged behavior.

20 The NFL Collective Bargaining Agreement could not
21 authorize a Bounty Program designed for the purpose of injuring
22 other players. It is illegal conduct. It is an intentional
23 tort. And, therefore, irrespective of the language in it, this
24 claim comes outside of preemption.

25 THE COURT: Do you concede that if there were no

1 Bounty Program, you'd have no cause of action?

2 MR. MILES: I concede that if there were no
3 intentional tort --

4 THE COURT: Well, let's assume. I mean, wasn't the
5 plaintiff arguing at the time that Royal, in fact, did intend to
6 injure him, the player did. But if there were no Bounty Program
7 and leaving aside even limitations for a moment, would you
8 concede that a cause of action had been stated if you could
9 establish that an opposing player really intended to hurt you?
10 I mean, that happens all the time, doesn't it?

11 MR. MILES: No, Judge, I don't think -- certainly,
12 there are hard hits. Certainly there are hits inside and
13 outside the rules of the game. But to claim, as we have
14 alleged, that a single player setting aside the Bounty Program,
15 for whatever motivation intentionally tried to injure another
16 player, hit him with the intent to injure, that is not only an
17 intentional tort, it is violation of the criminal law. And,
18 therefore, under preemption analysis and under the *Smith* case
19 and the *Jackson* case, that would fall outside of the CBA.

20 THE COURT: Well, stop there for a moment. I mean,
21 think about that. How many -- wouldn't it be in litigation all
22 the time with players suing other players because he speared me
23 deliberately. Boy, that seems to go on in every game. I mean,
24 that's an intentional tort. I'm not merely trying to put the
25 man down with the ball, I'm trying to hurt him.

1 MR. MILES: Well, Judge, I think what separates it in
2 kind and degree is what you saw in the *Hackbart* case. So,
3 clearly, in the game of football there are hard hits, there are
4 legal hits, there are illegal hits. But in the *Hackbart* case
5 that went up to the Tenth Circuit, what you had was a hit that
6 was maliciously designed to injure. Not to cause a fumble, not
7 to set a player out for a play or two; a hit that was
8 maliciously designed to injure.

9 And what that does is it takes us outside of our
10 typical tort civil law system and brings us into a very
11 different arena where intentional torts in criminal law, in
12 fact, prescribed the conduct. And by doing that --

13 Now, there can be other arguments and there were in
14 *Hackbart* and there are, I'm sure, in this case about assumption
15 of the risk and things like that. But that mere fact of the
16 malicious intent, the mens rea to injure takes it outside of the
17 realm of the Collective Bargaining Agreement, takes it outside
18 of the realm of anything that can be contracted to by the NFL
19 and the --

20 THE COURT: Let me ask you and I pose it to defense
21 counsel as well whether there have ever been any cases where a
22 player made a complaint within the Collective Bargaining
23 Agreement that another player deliberately sought to injure him?
24 That is, it was ever brought to a grievance within that, within
25 that system.

1 I mean, I wonder. It seems to me a lot of people
2 just -- the players pretty much assume that it's part of the
3 game.

4 MR. MILES: Judge, not only am I unaware of any such
5 grievance being brought, but in fact, I'm unaware of any
6 provision in the CBA cited to by defendants or anyone else that
7 would permit under the CBA or any rules of the NFL one player to
8 issue a grievance against another player under that contractual
9 provision.

10 THE COURT: You say, a player couldn't file a
11 grievance against another player?

12 MR. MILES: I've seen no indication in anything pled
13 that they could do so under the Collective Bargaining Agreement
14 here.

15 THE COURT: Well, could they file it against another
16 team?

17 MR. MILES: Not that I've seen. The Collective
18 Bargaining Agreement -- and this is what the *Hackbart* speaks to,
19 one of the things the District Court speaks to. District Court
20 says in the *Hackbart* case, there is no provision in the CBA for
21 disputes between players of different teams.

22 Now, in this case, the defendants have cited to
23 numerous different rules and regulations and bylaws. What they
24 have failed to cite -- and again, we're assuming the CBA applies
25 and we believe it does not, but what they fail to cite is a

1 single procedure in any of the documents they've provided this
2 Court that would permit Mr. Green to file a grievance against
3 Mr. Royal or against the defendant football team for purposes of
4 an intentional hit to injure him and seek any sort of recovery
5 or compensation.

6 There is no such provision within the CBA that's been
7 brought to our attention or this Court's attention in the
8 pleadings. And the reason is, quite frankly, it doesn't appear
9 to exist.

10 THE COURT: Well, the argument was made that, at least
11 citation to a case that it doesn't have to be explicit in the
12 agreement. It can be implicit. And the question is, is it
13 implicit even?

14 MR. MILES: Not only is it neither explicit or
15 implicit, they have not cited to a provision, which by my
16 reading would allow a player to even institute that procedure to
17 begin with. So, there's nothing within these documents that
18 they have cited that says, Mr. Green had the ability at any time
19 to bring this specific grievance in any way within the four
20 corners of the Collective Bargaining Agreement.

21 They've cited to a single broad interpretation of the
22 commissioner's overall authority, but no ability by a player to
23 bring a grievance against another player or against another
24 team. And in fact, that was one of the bases for the *Hackbart*
25 opinion.

1 The argument that the defendants make concerning the
2 rules and regulations that they allege we cited in the
3 complaint, which in fact we did not cite specific rules and
4 regulations. What we cited are industry standards. And
5 industry standards, as I think the Court discussed with defense
6 counsel, provide the backdrop can be evidence of negligence or
7 battery, or any other civil cause of action. But the mere
8 citation of them, even had we cited them verbatim, which we did
9 not, would not cause this cause of action to be preempted.

10 The very same argument was made by the NFL in the
11 *Brown* case. And what the *Brown* case determined, the Southern
12 District of New York, is that a plaintiff arguing a member of a
13 particular trade or profession behaved negligently in carrying
14 out his duties may appropriately use as evidence of negligence
15 manuals, regulations or other materials defining the reasonable
16 and expected standard of professional practice within that
17 occupation. Nothing more was done here.

18 Again, the arguments by the defendants is based on a
19 fundamental misunderstanding of the gravamen of the complaint.
20 This is not a negligence complaint saying that the defendants
21 should be liable because the employee or their employee breached
22 NFL Rule 1.7 Sub-Section 5, Sub Sub-Section A. That's not the
23 gravamen of the complaint. It's a Bounty Program to
24 intentionally injure another player for the purpose of
25 benefiting both the defendants.

1 The *Brown* case continues and, again, this is assuming
2 that not only are we within the grounds of the CBA and as I've
3 argued repeatedly, we're not; not only were there allegations
4 of -- and in the *Brown* case they were far more specific, of
5 specific NFL rules being violated.

6 What the *Brown* case eventually says, after again
7 looking at the document cited by the NFL, the same document
8 cited to this Court to try and create an argument that, in fact,
9 any interpretation of these rules; in fact, any mention of these
10 rules causes complete and total preemption.

11 What the *Brown* Court says is, again assuming the CBA
12 applies, assuming there's reliance upon these rules, which is
13 not our case, the *Brown* Court says, even if the references in
14 the plaintiff's complaint to the content of specific NFL rules
15 or to various instruction manuals for referees are seen not
16 merely as evidence of professional standards, pause, which is
17 what we have in this case, but as sources that define the
18 ordinary nature and risk of football and, thus, define the
19 duties of care owed to plaintiffs, these documents are not part
20 of the CBA.

21 As the CBA incorporates by reference, at most, only
22 the NFL constitution and its bylaws, and the terms of the
23 constitution and the bylaws need not be interpreted [sic] in
24 adjudicating plaintiff's claims, there is no need to interpret
25 the CBA and, therefore, there is no grievance procedure that

1 applies, and the no suit and the no grievance parts of the CBA
2 that are cited to by the defendants are inapplicable.

3 So, what *Brown* is saying is, let's assume the CBA
4 applies to intentional torts. Let's assume that the citations
5 in the plaintiff's complaint are actually directly the cause of
6 action of negligence, are based directly upon breach of those
7 particular standards. Let's assume both those things. Then and
8 even then, you still don't have preemption because those NFL
9 rules that they are relying upon so heavily, when you actually
10 examine the totality of the documents, are not even incorporated
11 into the CBA. They're separate and apart from the CBA. So even
12 when you get to that level of granular detail, they're still not
13 applicable, they still don't cause preemption.

14 And, therefore, the *Brown* case continues discussing
15 specifically the no-suit clause. As demonstrated above, while
16 the issue in this case could involve the NFL rules -- again,
17 that was the case where the referee threw the penalty flag that
18 struck the player in the eye. So in that case, the citation to
19 the rules was far more significant and the causes of action were
20 far more dependent upon it than they are in this case -- which
21 include a provision relating to the use of penalty flags, again
22 very specific, or the various official manuals, nothing in the
23 suit turns on the interpretation or enforcement of, or in any
24 way relates to the constitution and bylaws which relate to the
25 organization of the league and not to the rules of play. Thus,

1 by its own terms, the no-suit provision has nothing to do with
2 this lawsuit.

3 Continuing, the arbitration clause cited by the NFL
4 provides no greater help to its position. Why? Because the
5 cited arbitration clause only applies to disputes growing out of
6 CBA itself, the NFL player contract or the constitution and
7 bylaws. It does not purport to require arbitration of what
8 would otherwise be tort actions brought by players.

9 So, for a number of levels from the very initial
10 analysis, we are not a part of the CBA because the bounty
11 program is an intentional tort and the CBA could not prohibit or
12 could not cover that conduct, even if it so chose.

13 Going further into the CBA itself, it simply does not
14 even incorporate these rules the NFL, that the defendants in
15 this case allege are incorporated and provide the basis for
16 preemption.

17 And in fact, the rules themselves would not be
18 applicable in this particular case, because what they are is
19 citations by the plaintiff as is standard in almost every tort
20 suit in which they are applicable as evidence of breaches, but
21 they are not the gravamen of the complaint.

22 So for each of those reasons individually and
23 certainly cumulatively, preemption simply not apply in this
24 case.

25 THE COURT: All right. Want to reply, counsel?

1 MR. BALLEW: You just heard a discussion of the
2 grievance procedure. And the assertion is that the rules are
3 not subject to the grievance procedure. Let's walk through some
4 documents to address that issue.

5 First of all, again, Constitution and Bylaws, Section
6 9.32, every contract with any employee of the league or of a
7 club therein shall contain a clause wherein the employee agrees
8 to abide and be legally bound by the constitution and bylaws,
9 and the rules and regulations of the league as well as by the
10 decisions of the commissioner, which decision shall be final,
11 conclusive and unappealable.

12 THE COURT: You're saying that would allow the
13 commissioner to just decide any question he might decide.

14 MR. BALLEW: I'm saying that the parties have agreed
15 that the rules have to be a part of the contract and employees,
16 such as the plaintiff, have to agree that the commissioner will
17 address and interpret disputes under those rules, yes.

18 And Section 8.3, this is a dispute and the
19 commissioner has full, complete and final jurisdiction and
20 authority to arbitrate any disputes between or among players,
21 coaches and/or other employees of any member club or clubs of
22 the league, other than disputes unrelated to and outside the
23 course and scope of the employment of such disputants within the
24 league.

25 The contract in Section 14 speaks to rules, club and

1 league rules. The grievance procedure says, any dispute that
2 involves interpretation, application or compliance with the
3 agreement, the contract or the constitution and bylaws is
4 subject to this exclusive procedure.

5 The plaintiffs try and make the argument that this is
6 not something that involves a term and condition of employment
7 and therefore is not subject to this. We disagree. Term and
8 condition of employment is a term applied under the National
9 Labor Relations Act. It is applicable in many contexts.

10 When a union files a petition to have an election,
11 there is a period of time. And after that election, if they are
12 successful, there is a period of time in which the employer is
13 barred from making any changes in terms and conditions of
14 employment.

15 Many times employers despite those rules will make
16 changes because they think something is not a term and condition
17 of employment. But the National Labor Relations Board has for
18 75 years been interpreting that term and recognizes it is
19 extremely broad; wages, benefits, schedules and many other
20 things.

21 There is a Board decision when an employer had a
22 practice of handing out Thanksgiving Day turkeys. The union
23 showed up, filed the petition, the employer stopped handing out
24 Thanksgiving Day turkeys. The National Labor Relations Board
25 said, your practice of handing out those turkeys is a term and

1 condition of employment. You've changed it, you've changed it
2 unilaterally, and as a result of that, this is a violation of
3 the National Labor Relations Act. The National Labor Relations
4 Act is very broad when it comes to the concept of a term and
5 condition of employment.

6 So we have clear contractual language by the union
7 that says, these must be addressed. And then we have the
8 complaint in which the party who is bringing this case
9 repeatedly references the duties and the rules. And in this
10 situation, I'll refer to the *Brown* case in a second, but the
11 Supreme Court *Allis-Chalmers* decision would say, the question of
12 what the Washington football team and the Defendant Royal,
13 parties to a labor agreement agreed to and what legal
14 consequences were intended to flow from breaches must be
15 resolved per Federal Law under Section 301.

16 The *Rawson* decision would say, what the Washington
17 football team and Defendant Royal, if they breached the duty, it
18 was a duty that arose out of the Collective Bargaining Agreement
19 rules, and constitution and bylaws. Therefore, it is preempted.

20 Under the Fourth Circuit analysis, the question would
21 be, is there a duty that exists? What is the nature and scope
22 of that duty? You can't answer that question without getting to
23 the rules. And when you get to the rules, you get to the
24 obligation to address the parameters of those rules through the
25 grievance arbitration process.

1 *Brown* --

2 THE COURT: Let me just follow you, though, for a
3 minute. Through the grievance arbitration process from which
4 there is no appeal, you said, only to the commissioner. It's
5 not a normal arbitration, even in the sense that you can what,
6 challenge even the competency of the arbitrator, anything that
7 you can do under the Federal Arbitration Act. But your reading
8 is that once the commissioner says, that's it, there's no
9 appeal. The case should be dismissed if anybody files it. Is
10 that correct? Maybe I'm misunderstanding.

11 MR. BALLEW: No, let me clarify. There are provisions
12 in this Collective Bargaining Agreement that say arbitrator's
13 will address certain issues, and there are other provisions that
14 say the commissioner will address and resolve certain issues.
15 When it comes to Article IV, we are talking about the
16 arbitrators that are designated by the Player's Association and
17 Management Council. If that arbitrator makes a decision, then
18 under the Federal Arbitration Act and the Maryland Arbitration
19 Act, there are very limited opportunities for anyone to seek an
20 appeal.

21 The use of arbitration has many benefits and it has
22 certain detriments. The reality is that when parties in a
23 Collective Bargaining Agreement enter into a relationship and
24 say, I'm going to have this arbitrator decide this issue, then
25 they are foregoing certain options that otherwise exist in civil

1 litigation.

2 THE COURT: But is there internal appeal, internal
3 appeal to the commissioner from the arbitrator's decision?

4 MR. BALLEW: I do not recall seeing an internal
5 appeals --

6 THE COURT: That's what I was, perhaps, averting to.
7 I don't know that there is.

8 MR. BALLEW: Yes, but the decisions of an arbitrator
9 under this contract would be subject to the Federal Arbitration
10 Act, so there would be certain opportunities to take appeals,
11 but they are very limited. But that's because, again, under our
12 Federal Section 301 labor laws, the parties have entered into an
13 agreement that says, this process will rule. It will be
14 determined by the arbitrator.

15 And the Supreme Court cases since the 1960's have
16 repeatedly recognized, we can't have state courts coming in and
17 trying to take over that function, and creating a situation in
18 which state courts are giving different interpretations of
19 Collective Bargaining Agreements.

20 The parties agreed this arbitrator or these
21 arbitrators will rule. That is where the decision should be
22 made. And if we allow people to take something that is a
23 contract dispute and turn it into a tort claim, and engage in
24 artful pleading, we are undermining the federal labor principles
25 of Section 301.

1 *Brown* is very different. It was a different
2 collective bargain situation. *Brown* involved the referee. This
3 involves two players. Section 9.3 expressly recognizes rules
4 apply, and 8.3 of the constitution recognizes the commissioner
5 deals with disputes, including disputes among players.

6 The suggestion was made that there's not been citation
7 to any basis for Mr. Green to bring a claim under the grievance
8 process. I would disagree. If the Players Association in
9 conjunction with or if Mr. Green separate from the association
10 wanted to pursue the issue, he would pursue it under Article IV
11 of the Collective Bargaining Agreement.

12 The question that he would then present to the
13 arbitrator is whether or not he has articulated a purported
14 failure to properly interpret, apply or comply with the
15 agreement, with the NFL player contract or with the provisions
16 of the NFL's constitution and bylaws.

17 There is a mechanism. That mechanism should have
18 resulted in a grievance no later than February, 2005. We're now
19 in 2013. But that was something he could have pursued. And in
20 that situation, it would have been the arbitrator under the
21 contract, the parties had agreed to, who would make the
22 decision. Does he have a claim? Can he bring this claim?

23 This is what we refer to in labor law as grist for the
24 arbitral mill; a process for resolving disputes in industry that
25 recognizes the role of the arbitrator to make these decisions.

1 *Hackbart* was a different Collective Bargaining
2 Agreement. *Hackbart* was pre-Supreme Court analysis. *Hackbart*
3 is not good law. The Court should look to *Allis-Chalmers*,
4 *Rawson* and the *McCormick* decision to determine, how do I analyze
5 these documents and these claims. And again, this is a
6 situation where the argument is being made that these are
7 industry standards.

8 Industry standards is a term that is used in many
9 context, in many industries. You can't determine industry
10 standards unless you speak to the particular industry. In this
11 industry, it's the rules that set the industry standard. That's
12 why they cited it in their complaint. It was only when they
13 realized the implications of their admission in pleading that
14 they began to run away from that assertion, but they can't.

15 This is not a situation in which Mr. Royal owes a
16 general duty to everyone in society to, as they said in
17 paragraph 65, play the game of football in a manner that was
18 consistent with the rule set forth by the NFL.

19 THE COURT: Well, that's why I wonder whether there's
20 a difference between the allegation against Royal and the
21 allegation against the football team. That is, if the gravamen
22 is the payment of the bounty, does that create a different duty?
23 Is there a duty that the club has that, perhaps, the individual
24 player doesn't or maybe -- I don't know.

25 You argue something like a conspiracy, but I'm asking

1 that as well, because you say Mr. Royal owed a duty, et cetera.
2 But again, to come back to the gravamen, as they cast it, of
3 their complaint, it's the bounty system.

4 MR. BALLEW: The bounty system and the obligations of
5 the club are covered by the same rules, constitution and
6 Collective Bargaining Agreement. So if there is a duty in this
7 situation where we have allegations that grow out of conduct
8 under a Collective Bargaining Agreement, then you have to look
9 to the Collective Bargaining Agreement to determine, again, as
10 the Supreme Court has recognized, is there a duty? What is the
11 scope of the duty?

12 THE COURT: All right. Final word, because I want to
13 get on to limitations.

14 Mr. Miles, anything further?

15 MR. MILES: Judge, I don't have anything further.

16 THE COURT: All right, Mr. Ferguson.

17 MR. FERGUSON: Good morning, Your Honor.

18 I'm going to address the Statute of Limitations
19 argument. And this Court has the jurisdiction to determine the
20 substantive issues raised by the defendants in their Statute of
21 Limitations defense in the *Childers versus Chesapeake Potomac*
22 *Telephone Company* case. The Fourth Circuit says that,
23 although -- before the Court is a question of whether or not
24 preemption should or should not apply. If there are substantive
25 defenses raised, the Court may nevertheless in the interest of

1 judicial economy address the substantive defenses raised by the
2 defendants.

3 It is our position that the claim by Plaintiff Green
4 in this case is barred by the Statute of Limitations, because it
5 was brought more than three years after the incident occurred.
6 Plaintiff attempts to cast this claim in the discovery, in a
7 manner in which the discovery rule would apply and we submit
8 that the discovery rule does not apply here.

9 THE COURT: Before you go any further with this, I
10 gather, though, that with regard to the preemption claim, the
11 argument would be that also, essentially, the failure to exhaust
12 administrative remedies, which is comparable to a limitations
13 claim would result in dismissal of the case, just so we put a
14 fine point on that.

15 MR. FERGUSON: That is correct.

16 THE COURT: All right.

17 MR. FERGUSON: And there's also the six months Statute
18 of Limitations under the Labor Management Relations Act.

19 THE COURT: All right, very good.

20 MR. FERGUSON: But as far as the state law claims are
21 concerned, the Statute of Limitations applies.

22 Mr. Green in his complaint alleges that he was aware
23 of this claim on the very day that it happened. He first cast
24 this incident by reference to the previous game that was played
25 with the Redskins early in the season in which he claims to have

1 played an important role and made some starring defensive plays
2 that inhibited the Redskins' success and, indeed, the Giants won
3 that game. And when the second game came up on December the
4 5th, he alleges that there was some motivation from the Redskins
5 to get back at him, so-to-speak.

6 In the allegations in paragraphs 12 through 25 of the
7 complaint, Mr. Green sets out how when this occurred, he knew
8 immediately that he was injured. He knew immediately that a
9 play had been made that was beyond the bounds of the NFL rules.
10 He knew immediately that a sanction had been imposed by the
11 referee by imposing the 15-yard penalty for the type of block
12 that was executed by Mr. Royal. Mr. Green knew immediately that
13 a battery had occurred. Mr. Green knew immediately that he had
14 sustained injury as a result of that battery.

15 When we look at these facts through the lense of the
16 case of *Doe versus The Archdiocese of Washington and Lumsden,*
17 *Design Tech Builders.* Those two cases really set the limits for
18 what this Court should consider in applying the Statute of
19 Limitations.

20 Where the plaintiff knows of his injury, then the
21 discovery rule does not apply. It is the discovery of the
22 injury and not the discovery of all elements of the cause of
23 action that starts the running of the clock for the Statute of
24 Limitations.

25 It doesn't matter that there may have been some facts

1 that he did not know on that December day when he sustained his
2 injury. It does not matter that there may be other defendants
3 that he has yet to identify. It is only important that he was
4 able to identify on that very day that he sustained an injury as
5 a result of wrongful conduct by Defendant Royal.

6 The Court in *Lumsden versus Design Tech* goes on to say
7 that all that is required to commence the running of the Statute
8 of Limitations is the discovery of an injury and its general
9 cause, not the exact cause, in fact, or the specific parties
10 that are responsible.

11 So, the fact that some event occurred later or some
12 press report occurred later that allowed Mr. Green to discover
13 that, perhaps, Mr. Williams was involved or, perhaps, the
14 Washington Football Club was involved doesn't matter, because
15 the clock begins to start on his duty to investigate his own
16 claim when he knows that an injury has occurred and a wrongful
17 act has caused that injury.

18 This is not unlike -- pardon me. This is not unlike
19 the *Doe versus Archdiocese* case. And in that case, you'll
20 recall the young man who was, who claims that he was sexually
21 assaulted remembered some time later in his life that this had
22 had an impact on him.

23 The Court in *Archdiocese of Washington* said that this
24 was, in fact, a battery. One knows when a battery has occurred
25 and that there are harmful consequences. It does not matter

1 that you do not know the full scope of the harmful consequences.
2 And in relation to the employer of the priest who allegedly
3 committed these sexual assault, the Court of Special Appeals
4 said that when these happened, there's no question that the
5 plaintiff, Doe, knew who the priest was and knew who the priest
6 employer was. So, to discover who the employer was at a later
7 date really does not create a situation where the discovery rule
8 can apply.

9 In the *Lumsden versus Design Tech* case, the Court of
10 Appeals noted that once you are on notice of your cause of
11 action, a potential plaintiff is charged with the responsibility
12 for investigating within the three-year limitations period all
13 potential claims and all potential defendants. Knowledge of the
14 particular defendant is not a necessary element to trigger the
15 running of the Statute of Limitations.

16 We have on that December day knowledge by the
17 plaintiff of all of the elements of his cause of action for
18 battery, injury and wrongful conduct. We have on that December
19 day an event that triggered the running of the Statute of
20 Limitations for all other defendants that may be involved in
21 that incident and for all theories or causes of action that may
22 have been involved in that incident, and for any additional
23 layer of motivation that may have been involved in that
24 incident. The clock began to run on that day for his three-year
25 investigation period.

1 And that takes us into the other points that have been
2 raised by the defendant and that -- by the plaintiff; namely,
3 the alleged fraudulent concealment. Given the facts that have
4 been alleged here, plaintiff's complaint makes it absolutely
5 clear that he was aware of his cause of action the very day this
6 incident occurred. There was no concealment. He had an injury.
7 He was aware of wrongful conduct. And I say that because the
8 Fraudulent Concealment Doctrine just does not apply here,
9 because he was aware of his injury and his cause of action
10 immediately.

11 Nevertheless, as the Court discussed in the *Doe* case,
12 where fraudulent concealment is raised by the plaintiff in order
13 to toll the running of the Statute of Limitations, the complaint
14 must necessarily show specific allegations to show that the
15 defendants did something to conceal that cause of action. There
16 are no specifics alleged by the plaintiff to set forth any
17 conduct by either of the defendants that they said something or
18 they misled him, or they failed to disclose something.

19 THE COURT: Wait. I thought there was some
20 suggestion, though, that the -- maybe it was Mr. Green's own
21 coach who told him, no, this wasn't intentional or there
22 wasn't -- there was some inquiry made, as I recall.

23 MR. FERGUSON: That was Mr. Green's own coach.

24 THE COURT: He said he looked at it and there was no,
25 I don't know that anybody was contemplating a direct act by the

1 football, by the Washington football team. But as far as it
2 being intentional or other than just, perhaps, a dirty play,
3 nothing beyond that.

4 MR. FERGUSON: That's correct. And there was, there's
5 no allegations that the Washington football club or Mr. Royal
6 himself did or said anything to conceal this battery cause of
7 action from him. And I've already said that he knew it existed
8 that day.

9 In order to have the fraudulent concealment theory
10 apply, there must have been some conduct by the defendants that
11 caused the plaintiff to either be --

12 THE COURT: Well, nobody knew about this bounty
13 system, did they? I mean, let's talk about Mr. Williams and the
14 New Orleans Saints. I mean, nobody knew about it until years
15 later.

16 MR. FERGUSON: That's correct.

17 THE COURT: So you're saying that he was on his own
18 really to discover it within the three-year period. And at the
19 same time nobody else seemed to know about it within the
20 three-year period, he's got a special burden.

21 MR. FERGUSON: No, more than that. He alleges in his
22 complaint not only that he knew he was injured and that there
23 was wrongful conduct by Mr. Royal, but he alleges in his
24 complaint, and he says to the New York Post the next day that he
25 thought that this was intentional and that they were out to get

1 him. He had suspicions that very day or the next day that there
2 was more to this than just an illegal block.

3 Now, although the NFL has investigated this and found
4 no Bounty Program at the Washington Football Club --

5 THE COURT: What is the status with regard to the New
6 Orleans situation? What about Mr. Williams and New Orleans?
7 I'm recalling what I read in the papers, though, I don't know
8 what the current status is.

9 MR. FERGUSON: I know that the NFL has imposed
10 sanctions on --

11 THE COURT: Well, they made some sort of determination
12 --

13 MR. FERGUSON: Yes, they did.

14 THE COURT: -- that in fact, Mr. Williams at New
15 Orleans had a bounty system in place.

16 MR. FERGUSON: I don't really want to comment on --
17 I'm not involved in that.

18 THE COURT: I mean, if it's not a public matter, okay,
19 but I'm just curious as to what the status was of the situation
20 there.

21 MR. FERGUSON: I know that they --

22 THE COURT: It may bear on limitations and discovery
23 if the rule applies, because suddenly, as I say, the NFL is
24 coming to a conclusion about certain activity late in the game,
25 if you will, and the argument is somehow that the individual

1 plaintiff should have come to that conclusion earlier.

2 MR. FERGUSON: Well, I do know that the NFL imposed
3 sanctions on the coaches and the players that they claim to be
4 involved.

5 THE COURT: On the team as well?

6 MR. FERGUSON: On the team. And that procedure is
7 on-going as far as I know. I don't know if it has been --

8 THE COURT: Is Williams still in football? I have no
9 idea.

10 MR. FERGUSON: Pardon me?

11 THE COURT: Is Williams still in football?

12 MR. FERGUSON: Yes, he is.

13 THE COURT: What is he doing?

14 MR. FERGUSON: He's still with the Saints.

15 He's with the Tennessee Titans.

16 THE COURT: He's what?

17 MR. FERGUSON: He's with the Tennessee Titans now.

18 THE COURT: Okay.

19 MR. FERGUSON: In order to avail himself of the theory
20 of fraudulent concealment, the plaintiff also must exercise due
21 diligence himself. He admits as much in his complaint that all
22 he did was complain to his coach, and all he did was hope that
23 the NFL would do something about the Washington Football Club's
24 actions.

25 He made no attempt to follow up or investigate. He

1 even admits that there was nothing more that he could do. He
2 could have made a formal complaint to the NFL Commissioner; he
3 did not. He could have made a formal complaint or inquiry to
4 the Washington Football Club; he did not. He never investigated
5 by conducting any interviews with current or former Washington
6 football players. He did not check with the NFL to see if there
7 was any follow-up on their part.

8 So, to assert the theory of fraudulent concealment,
9 not only are the facts absent that the Washington Football Club
10 or Mr. Royal did anything to conceal this from him, but also he
11 did nothing to investigate himself. And concealment really only
12 comes into play if you do not know your cause of action exists.
13 And it is indisputable that Mr. Green knew his cause of action
14 existed.

15 THE COURT: Did he know that the Redskins were paying
16 bounties? That again, going back to what they say is the
17 essence of the complaint. Not that he was injured, not that
18 even Defendant Royal may have intended to injure him, but that
19 he was doing it pursuant to a Bounty Program.

20 MR. FERGUSON: Let's say for the purposes of argument,
21 certainly, he did not know of the Bounty program. The case of
22 *Doe versus Archdiocese of Washington*, and *Lumsden versus Design*
23 *Tech Builders* say that knowledge of the particular elements is
24 not necessary. Once on notice of one cause of action, and we
25 know indisputably he was aware of his battery cause of action;

1 wrongful conduct, injury. That gives him a cause of action for
2 battery. Once he knows of a cause of action, the plaintiff is
3 charged with the responsibility for investigating within the
4 three-year limitations period all potential claims and all
5 potential defendants. Knowledge of a particular defendant is
6 not a necessary element to trigger the running of the Statute of
7 Limitations.

8 And it's also important to note, because I know that
9 the plaintiff made the argument that he must know all of the
10 elements of his claim, but that is not the case. In *Lumsden*,
11 the Court of Appeals said, it is the discovery of the injury.
12 And I direct the Court again to the day of this event. Injury
13 caused by wrongful act. He fully knew what happened that day.

14 It is the discovery of the injury and not the
15 discovery of all elements of the cause of action that starts the
16 running of the clock for limitations purposes. All that's
17 required to commence the running of the limitations period is
18 the discovery of an injury and its general cause, and we know
19 what happened that day, not the exact cause in fact or the
20 specific parties that might be responsible.

21 And because of his knowledge of what occurred that
22 day, it triggered a duty to investigate. And he through the
23 filing of a lawsuit, the commencement of the discovery, the
24 depositions of relevant players and former players, relevant
25 coaches and former coaches could have gotten to the bottom of

1 what he alleges.

2 But instead, he is trying in this lawsuit to take this
3 outside of the CBA and outside of the arbitration process that
4 is called for by the CBA by simply alleging that a block that
5 was a violation under the NFL rules, he is adding a layer of the
6 bounty program over that. It's a simple allegation on his part
7 and he should not be allowed to take it outside of the CBA and
8 the NFL rules by that simple allegation.

9 He knew the day this occurred and then the next day in
10 the paper he says that he suspected there was some ulterior
11 motive in that block. He had the duty under Maryland law to
12 investigate and he did not. The Statute of Limitations was
13 triggered on the very day of --

14 THE COURT: Would that be true even if there was a
15 written policy that said, you'll get bonuses for making these
16 illegal hits? Doesn't matter? I mean, suppose there was clear
17 evidence that there was a document that had not been discovered
18 anywhere that clearly said that this program is designed to help
19 you injure players. We want you to do that. Would that make
20 any difference?

21 MR. FERGUSON: No, it wouldn't make any difference
22 because the, all of the elements of the battery were present on
23 that very day. He had the right to bring that cause of action.
24 He had the right to invoke the full power of discovery of the
25 NFL grievance procedure.

1 There is a discovery process in there. He could have
2 interviewed. He could have conducted a real investigation and
3 undertaken the discovery to learn that. And if there was a
4 written policy, one would expect it be disclosed during a
5 discovery process.

6 In the *Lumsden versus Design Tech Builders* case, there
7 was a geotech -- well, there was an engineering report about the
8 defective concrete. But once the lawsuit was filed and all this
9 information came out, this information about the real cause of
10 the failure of that concrete came out in discovery.

11 That didn't change the fact that the plaintiffs in
12 that case knew they had been injured and allowed the Statute of
13 Limitations to run without filing their lawsuit.

14 THE COURT: All right.

15 MR. FERGUSON: The same is so here.

16 THE COURT: All right. Let's hear from -- who is
17 going to argue for plaintiff.

18 Mr. Miles?

19 MR. MILES: Again, Your Honor.

20 Judge, if I could, I'd like to on the Statute of
21 Limitations argument start procedurally, because I think the
22 procedure matters here. Whereas on the preemption claim, there
23 is an argument that we're here on a Motion for Summary Judgment,
24 on the Statute of Limitations claim, it's a straight Motion to
25 Dismiss. And it's a Motion to Dismiss based on the Statute of

1 Limitations.

2 And so, I want to start talking procedurally about
3 where we're at and where the burden lies, because in the
4 complaint, there is no question that we have allegations of
5 invocation of the discovery rule and allegations of fraudulent
6 concealment.

7 THE COURT: Well, first question really is, I didn't
8 hear from Mr. Ferguson is, suppose there is dispute of fact as
9 to whether the discovery rule applies. Does that go to a jury?

10 MR. MILES: Absolutely.

11 THE COURT: Do they have to make a finding about
12 whether he reasonably did not know at the time that he had a
13 cause of action? I mean, I assume that defendant is arguing as
14 a matter of law that that's so, but the other side I question is
15 whether that should be a jury fact anyway.

16 MR. MILES: It positively should be, Judge. And the
17 basis for that is a case that I believe the defendants first
18 cited, which is *McBride*, a Court of Appeals case from Maryland.
19 And what the *McBride* case says on page 238, and I'm quoting, the
20 determination as to whether the plaintiff's failure to discover
21 his cause of action was due to failure on his part to use due
22 diligence or to the fact the defendant so concealed the wrong
23 that plaintiff was unable to discover it by the exercise of due
24 diligence is ordinarily a question of fact for the jury.

25 So, we're here on a Motion to Dismiss where there are

1 clear allegations, which must be taken as true in the complaint
2 that both the discovery rule tolls the Statute of Limitations as
3 well as the separate fraudulent concealment exception tolls the
4 Statute of Limitations.

5 At this procedural posture, there is no way that a
6 Motion to Dismiss can be granted on these particular allegations
7 in this particular complaint.

8 The Statute of Limitations under Rule 8(c) of the
9 Federal Rules of Civil Procedure is an affirmative defense. So
10 on the defense itself, they carry the burden. Much less on a
11 Motion to Dismiss where everything that we allege in the
12 complaint, discovery rule and fraudulent concealment must be
13 taken as true.

14 If there was any question as to who carries the burden
15 on a Statute of Limitations defense and on this particular
16 argument, it was answered in the *Halley Development* case, which
17 is number one in your binder that we cited as well, which
18 clearly notes, again quoting, the defendant has the burden of
19 proving both discovery rule components.

20 So, it's an affirmative defense where they carry the
21 burden on a Motion to Dismiss where the allegations in the
22 complaint are presumed to be true.

23 Defense counsel referred repeatedly to the *Lumsden*
24 case and it's a case that is used throughout their briefing.
25 The *Lumsden* case says very clearly where the burden lies and how

1 the burden should be utilized. In the *Lumsden* case the Court
2 says, and I'm on page 802, the defendants had the burden, the
3 defendants had the burden of proving that more than three years
4 before filing suit, number one, the plaintiffs knew of facts
5 sufficient to cause a reasonable person to investigate further.
6 And number two, a diligent investigation would have revealed
7 that plaintiffs were victims of fraud, the alleged tort.

8 There is no evidence in this record, nor could there
9 be, quite frankly, on a Motion to Dismiss that any investigation
10 undertaken by Plaintiff Green in this case ever would have
11 uncovered the Bounty Program, which is the gravamen of this
12 complaint.

13 The defendants have not submitted any such evidence,
14 nor could they on a Motion to Dismiss. And in fact, everything
15 that we know from outside the four corners of the complaint is
16 that, in fact, such a diligent investigation would not have
17 revealed the existence of the bounty program; would not have
18 revealed the gravamen of the complaint. And in fact, until this
19 very day, in their pleadings they deny the existence of the
20 program.

21 So, to deny -- again, on a Motion to Dismiss with the
22 allegations in the complaint where they continue to this very
23 moment to deny the existence of the Bounty Program and they
24 carry the burden on an affirmative defense, it simply can't be
25 decided with these allegations on a Motion to Dismiss.

1 The *Doe* case is also a case that the defense relies
2 heavily upon. And what the *Doe* case says is quite interesting,
3 because what *Doe* finds and I'm specifically on page 177 on *Doe*
4 and I'm reading verbatim, "The cause of action does not accrue
5 until all elements are present, including damages however
6 trivial."

7 So, again, taking a step back and just acknowledging
8 where we are procedurally, there is an affirmative defense
9 alleged which they have the burden to prove on a Motion to
10 Dismiss where the allegations in the complaint are taken as
11 true. There are allegations in the complaint, significant
12 allegations both to invoke the discovery rule, as well as
13 fraudulent concealment.

14 There is no evidence that plaintiff was on notice of
15 all elements in the complaint, nor could there be in a Motion to
16 Dismiss. And there is certainly no evidence and, in fact, if
17 anything, there is evidence to the contrary that a diligent
18 investigation by Plaintiff Green or anyone, for that matter,
19 would have disclosed the existence of the bounty program, which
20 is the gravamen of this complaint.

21 It only became apparent and it's still not apparent in
22 this suit, because they still deny its existence, in March of
23 2012, when there was an article disclosing this particular
24 practice occurring with this particular defendant. That's when
25 the Statute of Limitations begins to run under both the

1 discovery rule and the fraudulent concealment.

2 So, Judge, I don't mean to be overly brief and I'm
3 certainly happy to answer any questions, but --

4 THE COURT: Well, there is an Alternative Motion for
5 Summary Judgment here as well.

6 MR. MILES: On the preemption?

7 THE COURT: Am I wrong? Is there not a Summary
8 Judgment Motion that goes to the limitations argument?

9 MR. FERGUSON: Yes, Judge.

10 MR. MILES: Judge, if there is an allegation -- if
11 there is a claim that the Motion for Summary Judgment applies to
12 the Statute of Limitations as well under the case law I cited
13 with respect to it being a question of fact, clearly there is no
14 evidence they have submitted to this Court that in any way,
15 shape or form says all the elements were met and that a diligent
16 investigation --

17 THE COURT: We need to parse this further though. He
18 cited a case or Mr. Ferguson cited a case that says, once you
19 know of your injury, which he did as of that day and he
20 suspected it was done intentionally, he had a duty to
21 investigate and he didn't investigate. And he says, therefore,
22 as a matter of law, leave aside Motion to Dismiss at this point,
23 he should prevail.

24 Now, maybe the argument that you make is the same, but
25 you need to address a different standard really when you're

1 talking about Summary Judgment.

2 MR. MILES: Correct. And, Judge, what that case says,
3 which he cited which is the *Lumsden* case, is that they have the
4 burden of not just showing that there could have been an
5 investigation or that more could have been done, but rather that
6 a diligent investigation would have revealed that the plaintiff
7 was the victim of a tort.

8 And there is no evidence in this record that any
9 diligent investigation -- in fact, there's no evidence at all on
10 the Statute of Limitations, but there is certainly no evidence
11 in this record that a diligent investigation would have revealed
12 the existence of the Bounty Program.

13 THE COURT: Yeah, but -- well, but go to the --
14 they're also arguing about the duty, that there was no
15 additional element that needed to be known about. That the
16 bounty system, in effect, doesn't really add to what your
17 knowledge should have been. Whether you knew about the bounty
18 system or not, all the other key elements of the tort were known
19 as of December 2004, was it? That's the argument that he makes,
20 that the legal analysis was there. And the fact that there may
21 be another defendant or ulterior reason that you don't know
22 about really doesn't matter, because everything that you -- that
23 should have put you -- everything that you had was then and
24 there done.

25 MR. MILES: And, Judge, this harkens back to your

1 hypothetical to me during the preemption argument, which is,
2 well, if the allegation was simply that Defendant Royal
3 intentionally injured the plaintiff, and we were talking about
4 preemption then, would that be a different allegation in degree
5 and kind for purposes of preemption? And I answered, no,
6 because it's our position intentional torts are outside of the
7 CBA.

8 But it would be a different argument for purposes of
9 the Statute of Limitations. And the reason why is this is a
10 different complaint than a complaint that argued or alleged that
11 Defendant Royal with malice of forethought attempted to injure
12 the plaintiff during a football game December, 2004. If that
13 were the allegation, if that were the cause of action, then I
14 would agree that under the defendant's case law, the Statute of
15 Limitations began in September, 2004.

16 But this complaint is based upon the Bounty Program
17 and the allegation that the Bounty Program did not come to light
18 in any way, shape --

19 THE COURT: Well, articulate for me the legal standard
20 that gives you a right to sue because of the Bounty Program.
21 What is the legal theory of liability?

22 MR. MILES: For both --

23 THE COURT: For suing the Washington Football Club
24 because of the existence of the Bounty Program. How does
25 it exist independently of Mr. Royal committing a tort of

1 battery?

2 MR. MILES: Because with respect to the Washington
3 Football Club, there are specific allegations both of direct and
4 active negligence stemming from the Bounty Program that would
5 not exist, would not exist in the instance of Defendant Royal
6 simply going rogue and intentionally injuring Plaintiff Green.

7 THE COURT: Why is it articulated as negligence rather
8 than as intentional tort?

9 MR. MILES: I believe it's articulated in the
10 complaint as both. And the act of negligence --

11 THE COURT: The battery is, that's right, vicarious
12 liability, but then you have two counts of negligence and
13 negligent supervision. I gather negligent supervision is
14 attended if Williams did it on his own, the football coach
15 should have known.

16 MR. MILES: Correct. And the negligent supervision
17 which is a count that we have not even discussed, clearly there
18 are elements within that that did not come to light by any way,
19 shape or form under anyone's calculation until March of 2012.
20 But the act of negligence claims against the defendant football
21 team are based entirely upon their supervision, acceptance and
22 promulgating of the Bounty Program leading to the hit by
23 Defendant Royal.

24 So, essentially, the Defendant Royal is the
25 instrumentality of the defendant football team's negligence.

1 And that cause of action based on that theory with those
2 elements simply did not exist until March of 2012.

3 And even if you were to go back in time and argue, as
4 they have, that in December of 2004, the plaintiff should have
5 been on notice and should have undergone a diligent
6 investigation, you still have the burden as the defendant
7 asserting an affirmative defense to prove that, A, that diligent
8 investigation could have been undertaken; and, B, that had that
9 diligent investigation been undertaken, it would have, in fact,
10 disclosed the existence of this particular tort. They don't
11 have evidence, certainly not at this stage, to meet this burden.

12 THE COURT: I'm trying to get you to articulate the
13 theory of liability. One, the immediate liability of someone
14 is, you shall not commit a battery against someone else. And
15 the way I'm trying to understand the tort you're alleging
16 against the football club is, you shall not have a policy that
17 someone should go out and deliberately commit a tort against
18 another person.

19 MR. MILES: Correct.

20 THE COURT: Is there such a thing?

21 MR. MILES: Yes.

22 THE COURT: And does that exist -- would that be
23 within the normal period of limitations ordinarily? Leave aside
24 the Bounty Program that comes to light whatever it is, 12 or
25 eight years later. If you discover that somebody had

1 deliberately, by a written contract, let's say it's clear
2 evidence put somebody up to do a hit job or something, whatever
3 it might be, but you know that you've been murdered or you know
4 that you've been wounded in a three-year period and it's
5 pursuant to a contract for hire, whatever it is, hired gun.

6 MR. MILES: Correct.

7 THE COURT: Is that a separate theory or is it all
8 part of a theory?

9 MR. MILES: It's a separate theory. And here's
10 perhaps the clearest way I can explain it. An employer would
11 not have vicarious liability, would not have responsibility,
12 typically for an employee who went and committed an intentional
13 sort or a crime for that matter.

14 The way that the defendant football team or any
15 employer becomes responsible for those actions is if they
16 condone them, if they are a party to them, if they have active
17 negligence in -- with respect to that particular claim.

18 So, intentional injury with malice of forethought by
19 Defendant Royal acting rogue separate and apart from a bounty
20 program or anything else, traditional, civil causes of action no
21 vicarious liability for the employer.

22 THE COURT: Unless it's in the scope of his
23 employment, I'm not really sure that's true, what you just said.

24 MR. MILES: Within the scope of employment, I think
25 most or certainly some courts would hold an intentional tort

1 would always be outside the scope and course of the employment.
2 But what makes this allegation different in kind and in degree,
3 what makes the cause of action different is we allege the Bounty
4 Program, which creates -- not just condoning, not just condoning
5 of the hit itself, but in fact a policy and procedure that
6 pre-existed the hit.

7 THE COURT: That's what I'm asking you. Why is that
8 negligence? Why isn't that in itself a direct intentional tort
9 by the football club?

10 MR. MILES: It probably is both.

11 THE COURT: I don't see it pled that way is what I'm
12 saying. I see a vicarious liability claim as to Royal, but that
13 depends on his liability. There's nothing that says directly,
14 you formulated this policy as a direct result of which I was
15 injured.

16 MR. MILES: In Count Two, which we've titled Vicarious
17 Liability, and I'm looking at paragraph 58 and 59. We discuss
18 the defendant football team through their supervisory coaching
19 staff maintained a Bounty Program in which players were
20 encouraged and even compensated for playing outside the rules of
21 the game and for intentionally injuring other players.

22 Next paragraph, that this conduct was
23 institutionalized within the defendant football team and the
24 defendant football team were complicit in the battery and injury
25 of Defendant Green. That's a direct act of negligence claim

1 against the defendant football team for their creation,
2 condoning and ratifying this policy of --

3 THE COURT: You keep talking language of negligence
4 against the football team, but you're talking language of intent
5 when you talk about what they did.

6 MR. MILES: And it's both. We've argued both
7 negligence, and I believe in Count Two vicarious liability --

8 THE COURT: Maybe you've really put two causes of
9 action in there. One is for vicarious liability as to what
10 Royal did and the other is their own intentional tort, as you
11 articulate it, I think, in creating a Bounty Program.

12 MR. MILES: Correct, which I've articulated as active
13 negligence. But, yes, it is something separate and apart from
14 the strict vicarious liability an employer would typically have
15 for an employee operating within the course and scope of --

16 THE COURT: Sounds like an intentional tort to me, but
17 that's what I'm having some, at least, conceptual difficulty
18 understanding. And you may have folded it both into Count Two.
19 The allegation certainly seems to be there, that it was an
20 intentional program to cause this injury. And then it also was
21 because Royal allegedly did certain things, the football club is
22 vicariously liable for what he did.

23 MR. MILES: I think that's fair. I think Count Two
24 could be broken into two separate counts in exactly that manner.

25 THE COURT: Okay.

1 MR. MILES: Just in conclusion, there are six or, I
2 believe seven, again, specific paragraphs in the complaint which
3 lay out the fraudulent concealment exception to the normal
4 Statute of Limitations.

5 Those disclose the fraud that occurred, the identity
6 of the person committing the fraud and the reliance upon the
7 fraud. So, if we're on a Motion to Dismiss, allegations taken
8 as true. If we're on a Summary Judgment, there is no evidence
9 submitted by the defendants that contradicts those allegations.
10 Certainly not that would allow this Court to grant Summary
11 Judgment on it.

12 So, for two separate bases, based on the allegations
13 in the complaint and the dearth of the evidence submitted by the
14 defendants who have the burden of proving the Statute of
15 Limitations defense, we believe that motion should be denied as
16 well.

17 Thank you.

18 THE COURT: All right. Mr. Ferguson.

19 MR. FERGUSON: Thank you, Your Honor.

20 Let me clear up a couple of things. The complaint
21 sets forth a claim against Mr. Royal for battery and a claim
22 against the Washington Football Club for negligence and
23 negligent supervision. Our filings included a Motion to
24 Dismiss, or in the alternative for Summary Judgment.

25 The alternative for Summary Judgment was because we

1 added to the court file and the pleadings the provisions of the
2 Collective Bargaining Agreement. It is our position that on its
3 face, the four corners of the complaint set forth facts, which
4 if taken as true dispose of the plaintiff's claim on the Statute
5 of Limitations, and dispose of every cause of action of the
6 plaintiff against these defendants because of the Statute of
7 Limitations. There's enough information within the four corners
8 of the complaint for the Court to rule on that as a matter of
9 law.

10 Counsel has suggested to the Court that the rule to be
11 applied is that the plaintiff must know and be on notice of
12 every element of his cause of action in order for the Statute of
13 Limitations to be triggered. That is not the standard in
14 Maryland.

15 That language was taken out of *Doe versus The*
16 *Archdiocese of Washington*. And the Court did say that all of
17 the elements of the cause of action must be present, not that
18 the plaintiff must be on notice. And I'll get to the on notice
19 in a moment, because the Court of Appeals addressed that
20 specifically in *Lumsden versus Design Tech Builders*.

21 But in *Doe versus Archdiocese of Washington*, the Court
22 was talking about a battery. And it recognized that factually
23 if there was an impermissible touching of the plaintiff and he
24 was injured by it, that all of the elements were present.

25 Here in this case of Mr. Green, there was wrongful

1 conduct, as he has alleged in his complaint; namely, the crack
2 back, the crack block and an injury which he says occurred that
3 very day. All of the elements of his cause of action of battery
4 were present that day. And once that occurred, and I'm quoting
5 from *Doe versus Archdiocese* at page 188, 189, once on notice of
6 one cause of action, a potential plaintiff is charged with
7 responsibility for investigating within the limitation period
8 all potential claims and all potential defendants."

9 THE COURT: This is Maryland Court of Appeals
10 speaking?

11 MR. FERGUSON: This is the Court of Special Appeals.

12 THE COURT: Okay.

13 MR. FERGUSON: Knowledge of the identity of particular
14 defendant is not a necessary element to trigger the running of
15 the Statute of Limitations. And then our Court of Appeals in
16 *Lumsden versus Design Tech Builders* quoted a passage at page
17 450. "It is the discovery of the injury and not the discovery
18 of all of the elements of the cause of action."

19 So quite clearly, our Court of Appeals is saying, you
20 don't need to know all of the elements of the cause of action.
21 You need to discover that you were injured. It is the discovery
22 of the injury and not the discovery of all of the elements of
23 the cause of action that starts the running of the clock for
24 limitations period. That is when the limitations period started
25 for Mr. Green, the day of his injury. He knew of his injury, he

1 knew of the wrongful conduct. All of the elements were present.

2 THE COURT: What about these asbestos cases where the
3 causation is determined years later? People develop some sort
4 of lung problems and it isn't until considerable period of time
5 after limitations that they realize it's some sort of working
6 condition that caused it. Are they subject to the three year
7 period limitation?

8 MR. FERGUSON: They're not, because they don't know
9 they've been injured.

10 THE COURT: No, they may well know that they've been
11 injured. They don't know how. Maybe there is an aspect of what
12 you just said being so, but they also don't necessarily know
13 what the cause was, do they?

14 MR. FERGUSON: Well, you bring up an interesting
15 point, because my understanding of the asbestos cases is they do
16 not know they have been injured until some symptoms begin to
17 occur and then they discover what the injury is.

18 *Lumsden versus Design Tech Builders* is the other
19 situation you're talking about. They know they're injured, but
20 don't know why. In *Lumsden versus Design Tech*, they knew that
21 the concrete was failing. And at first, they thought it was
22 because of the salt and chemical products that were put on their
23 by the landscaping company.

24 But later, they learned that there was a flaw in the
25 concrete itself used by the developer, *Design Tech Builders*.

1 And the Court of Appeals says, it does not matter. It's the
2 discovery of the injury that triggers the cause of action. So,
3 although they knew their concrete was failing and didn't
4 discover why until some time later, that did not stop the
5 running of the Statute of Limitations.

6 It's not cited in our briefs. It may be cited in some
7 of the cases, but this is an interesting case involving the
8 Sisters of Mercy in Baltimore. They had a retirement home
9 constructed and their roof leaked. And they called in
10 contractor after contractor to try and fix it. They knew their
11 roof leaked. It wasn't until five years or so later that they
12 discovered that it was design by the architect that caused that
13 problem. And suit was filed and it was barred by the Statute of
14 Limitations because the cause of action against the architect
15 who had the poor design began to run when they first noticed the
16 roof was leaking, not when they noticed that there was a design
17 flaw.

18 *Lumsden versus Design Tech* makes it quite clear that
19 it is the discovery that you are injured that triggers the cause
20 of action, not the discovery of all of the element of the cause
21 of action or the particular cause.

22 THE COURT: Regardless, for example, of how extreme
23 the concealment of liability might, potential liability might
24 have been by the perpetrator. In other words, you know, it's
25 known that somebody gave rise to this particular injury, but the

1 fact of it is so beyond the realm of ordinary investigation that
 2 you don't discover it until after limitation, ordinary
 3 limitations. Doesn't matter, you say?

4 MR. FERGUSON: It doesn't matter, not in the facts of
 5 this case, because let's take *Lumsden versus Design Tech*. They
 6 knew there was a failure of the concrete. They just didn't know
 7 why. The builder in that case didn't do anything to cause this
 8 to be concealed. They knew this concrete was failing. That's
 9 what triggers the running of the Statute of Limitations.

10 In this instance, Mr. Green knew on the very day of
 11 this game that he had sustained an injury. That triggered the
 12 running of the Statute of Limitation as to all causes of action,
 13 as to all defendants and to all elements of those causes of
 14 action.

15 THE COURT: All right. Let me go back for a minute to
 16 an analysis that I'm trying to get my hands around and I asked
 17 at one point whether there's a difference between Royal's
 18 liability potentially on these issues and the football club's
 19 liability. And that's why I'm looking at whether there is an
 20 independent cause of action against the football club, not for
 21 vicarious liability for an intentional tort by Royal, but for
 22 formulating a Bounty Program that sought to injure opposing
 23 players.

24 That's the core allegation that's being argued, but
 25 it's not set out as a distinctive cause of action. There's

1 reference to it in various paragraphs, that if you start with
2 the Royal situation, everything that Mr. Ferguson says is true.
3 The plaintiff is injured on that day. He knows he's been
4 injured. He knows he's been injured deliberately. And
5 essentially, suit is filed against Royal, I guess, for that and
6 then by his employer, the football club, for allowing him being
7 vicariously liable for letting him do that.

8 That cause of action may have existed within the
9 three-year period, but it may be gone. The cause of action that
10 may really be at the heart of the case is the one that I kept
11 asking you, Mr. Miles, articulate the separate cause of action;
12 which is, can someone in effect put out a contract to injure
13 somebody else or whatever it is that's essentially -- maybe
14 that's what it's like, a contract for hire. Is that a separate
15 cause of action? Is that one that we're really talking about
16 where the discovery rule applies as opposed to simply an
17 intentional illegal hit back in 2004, because we may be talking
18 past each other than this in terms of where we are.

19 MR. FERGUSON: Fortunately, our Court of Appeals has
20 addressed that very question.

21 THE COURT: They have. Well, I'm amazed. Go ahead.

22 MR. FERGUSON: Let assume for the purposes of this
23 argument that Mr. Green's claim against Mr. Royal for the
24 battery that occurred that day is one cause of action. And then
25 the -- some cause of action based on the Bounty Program against

1 the Washington Football Club is a separate cause of action, and
2 he discovers it sometime later.

3 Court of Appeals in *Lumsden versus Design Tech* at page
4 450, it's the discovery of the injury, not the discovery of all
5 of the elements of the cause of action that starts the running
6 of the clock for limitations purposes. And they go on. Here,
7 all that is required to commence the running of the limitations
8 period is the discovery of an injury, and its general cause, not
9 the exact cause, in fact, and the specific parties responsible.

10 So I mean, they did recognize, you know there's an
11 injury. There may be other elements of what caused it or may be
12 other parties that caused this injury, but once you're on
13 notice, once it's triggered, the clock is running and you're off
14 to the races to discover everything else. It is the
15 responsibility of the plaintiff to investigate within the
16 limitations period all potential claims and all potential
17 defendants with regard to the injury.

18 THE COURT: Well, that may be -- that's Court of
19 Special Appeals or Court of Appeals?

20 MR. FERGUSON: First quote was from the Court of
21 Appeals. The last one was from the Court of Special Appeals.

22 THE COURT: Well, Mr. Miles, I want to you to address
23 this. You don't necessarily have to come up with a final
24 statement on this today, but you see my dilemma. As I
25 understand one cause of action for against battery against Royal

1 and vicarious liability for the battery, that can exist
2 independently of a Bounty Program. Maybe or maybe not, but at
3 least there's a theoretical cause of action there.

4 But the Bounty Program is the gravamen and, perhaps,
5 it does need to stand out as a separate cause of action and
6 whether given the language that Mr. Ferguson has cited, you can
7 get past that obstacle.

8 And again, this is Court of Appeals, which sometimes
9 goes overboard, candidly, when they don't have all the facts.
10 That's why we deal from case to case here rather than these
11 broad statements that forever guide us, but at least it's along
12 lines of your argument.

13 And I think we need to look at this sort of separate
14 contract for hire, if you would. Don't want to be too invidious
15 about this, but you see the analogy. It's different from simply
16 vicarious liability for an employee's tort.

17 MR. MILES: Judge, if I can address that and I'm happy
18 to do it from here.

19 THE COURT: All right.

20 MR. MILES: Judge, that count exist in the complaint
21 under Count Four. Count Four, which begins at page 12 of our
22 complaint, the negligence count directly against the defendant
23 football team. And if you go to page 14 of that count of the
24 complaint at actually paragraph 80, paragraph 80 reads that
25 defendant football team breached its duty to plaintiff by

1 allowing the aforementioned Bounty Program to develop and
2 flourish. This negligence, gross negligence and maliciousness
3 resulted in Defendant Royal injuring the plaintiff. And then it
4 continues to go on and explain exactly why --

5 THE COURT: It still doesn't talk about intentional.
6 It's negligent, gross negligent and malicious. Maybe when you
7 talk about malice, you're talking about intentional, but it
8 fuses the --

9 I mean, the question is, what's the standard here
10 anyway? If you try this cause of action, what are you saying?
11 That it varies from -- if you start with a negligence concept,
12 it varies from a standard of care or with regard to ordinary
13 and -- standard of care or it's way beyond that in the sense
14 that you actually formulated the policy.

15 I mean, that's what you're saying here, that the Red
16 -- no, let me be careful about that. That the football club
17 deliberately formulated a policy to injure your client. That's
18 what you're saying.

19 MR. MILES: Correct. And, Judge, I believe that this
20 particular count, obviously, negligence is straight negligence.
21 Again, I'm reading from paragraph 80. As we go on the spectrum
22 of mens rea, gross negligence becomes further along the spectrum
23 towards an intentional tort. Maliciousness would be further
24 along that spectrum. Maliciousness would pre-suppose malice,
25 which would pre-suppose intent to injury. So this particular

1 count does, in fact, have I believe that intentional tort pled
2 within it.

3 THE COURT: Well, candidly, what it really ought to
4 say -- there ought to be separate causes of action. One could
5 be for, if you say, straight negligence. I'm not sure that
6 would past muster when we got to a discussion of the merits if
7 it survives the preemption argument and so on. Gross negligence
8 is another standard. Intentional tort is another standard.
9 Now, you fused all three of them, I think, into this one count.

10 MR. MILES: Correct.

11 THE COURT: And as I say, as the case might get tried,
12 it goes to the jury with different instructions, and not just as
13 a single count. You don't say, how do you find on Count Four
14 and then put three different possibilities within it. You need
15 to think about how a case gets tried.

16 Anyway, that may be something that we're going to have
17 to sort out over time.

18 MR. MILES: Sure. And we can certainly amend to add
19 separate counts.

20 THE COURT: All right. Anyway, the issue that you're
21 still faced with, I think, is this argument and maybe we can
22 wind up on this point, that even if there is a separate cause of
23 action for the intentional formulation of a contract to injure
24 somebody in your line of business, is there, is that subsumed in
25 the argument that Mr. Ferguson makes that you still have -- once

1 you know your injury, you got to know all these potential
2 contributors or is there something unique and different about
3 that that would put the discovery rule in play.

4 MR. MILES: Well, two explanations, Judge. First of
5 all, I think there is something unique and different about that.
6 I mean, the fact of the matter is, particularly, with respect to
7 the defendant football team, no facts of that particular cause
8 of action were known until March of 2012. There was absolutely
9 nothing known about the Bounty Program, how it operated, whether
10 it operated at the defendant's football team; who ran it, how
11 they ran it, why they ran it?

12 None of those facts existed and plaintiff cannot be
13 charged with notice of any of those facts until such time as the
14 article gets published in March of 2012. That in and of itself,
15 I think, is sufficient to deny the motion.

16 The second point I would make is defense counsel
17 continues to refer to one part of the discovery rule burden that
18 defense has in order to show that the Statute of Limitations
19 applies, but not the second part. And I'm reading a different
20 quote here from *Lumsden*, which is a case that they heavily rely
21 upon obviously. "A claimant reasonably should know of a wrong
22 if the claimant has knowledge of circumstances which ought to
23 have put a person of ordinary prudence on inquiry with notice of
24 all facts, pause."

25 That's the part they keep arguing. They keep saying,

1 in 2004 when the hit occurred, the plaintiff was on knowledge,
2 on notice of the existence of all the facts. But the test
3 continues and their burden continues.

4 And what it says is, continuing on, "Which such an
5 investigation would in all probability have disclosed if it had
6 been reasonably pursued." That second part of the test, they
7 simply can't meet on a Motion to Dismiss, which I'm still
8 unclear if we're on that or on a Motion for Summary Judgment.

9 A Motion for Summary Judgment or anything else, there
10 is no claim in this case, nor could there be, because they
11 continue -- remember, Statute of Limitations, affirmative
12 defense, a plea of avoidance. There is no claim in this case
13 that the plaintiff could have, could have discovered the
14 existence of the Bounty Program more than three years prior to
15 filing his complaint if he had diligently pursued it in some way
16 that they believe he did not. That doesn't exist.

17 THE COURT: All right. Final word.

18 MR. FERGUSON: It doesn't matter that they did not
19 know who did it or who, who else might be responsible. Our
20 Court of Appeals has quoted with approval from *The Archdiocese*
21 *of Washington* case, once on notice of one cause of action, a
22 potential plaintiff is charged with responsibility for
23 investigating within the limitations period all potential claims
24 and all potential defendants with regard to the injury.

25 And it goes on to say at page 451, limitations begins

1 to run when the fact of the injury is known, not when alleged
2 wrongdoers are identified. And there is no dispute within the
3 four corners of this complaint the fact of the injury was known
4 on the day of this football game. The Statute of Limitations
5 was triggered.

6 All these other cases that talk about other elements
7 or other investigations are cases where the complexity of the
8 injury is such that you don't know what the injury is or that
9 you have been injured.

10 Just like *The Sisters of Mercy*, when the first leak
11 occurred, they knew they had an injury. It's just too bad that
12 it took them five years to discover that it was the architect,
13 not the contractor; that it was a poor design, not a poor
14 installation.

15 THE COURT: All right.

16 MR. FERGUSON: Thank you, Your Honor.

17 THE COURT: Let me pose this to you. I'm going to
18 write an opinion in this case, so I won't give you an oral
19 opinion at this point. But I want to invite the parties and
20 I'll give plaintiff two weeks to -- well, let's see. We're in
21 December almost already. Bit of a short fuse, but by the end of
22 December, I would say. If you want to look at this issue of a
23 separate cause of action for a party which deliberately engages
24 another party to cause physical injury to a client, what kind of
25 case that is in terms of the elements and whether there is a

1 discovery-type issue involved there where the contract, if you
2 will, only comes to light beyond the ordinary limitations
3 period.

4 Assuming that there's an injury that occurs as an
5 ordinary injury would for the three-year period, I think you
6 need to look at that and see whether that particular cause of
7 action separately stated has a different character. And then
8 I'll give the defendant, if you want, 30 days to respond in
9 terms of any write-up.

10 MR. MILES: Would you like this in a supplemental
11 briefing?

12 THE COURT: I think you should do it as a supplemental
13 brief. I mean, I think -- look at that issue. It's really
14 something more I thought about as I looked at your papers and I
15 didn't do any independent research on it myself. Believing in
16 the adversarial system, I'd like you to do it and I'll see what
17 I can supplement, but let's do it that way and see where we are.

18 And it will take a while to get this opinion written
19 anyway, and I don't think we're going anywhere in this case.
20 It's all sort of, I think, established already. Nobody needs to
21 get an answer by the end of next month, but we will write an
22 opinion, I think. It's an important issue. There's some
23 interesting issues to deal with here.

24 MR. MILES: And just in terms of deadline, do you want
25 us to --

1 THE COURT: Well, can you do it by end of December?

2 MR. MILES: Sure.

3 THE COURT: I mean, there's a holiday in between, but
4 do the best you can, two holidays.

5 MR. MILES: Not a problem.

6 THE COURT: And then if defendants can respond within
7 30 days. And then you can have 15 days to reply. If you need
8 more time, let me know. I mean, this is not necessarily the
9 front burner opinion. I've got some other opinions I'm working
10 on now that will have to take priority.

11 But that said, interesting argument and we shall have
12 something to say about it soon enough.

13 MR. MILES: Thank you, Judge.

14 THE COURT: All right. Thank you very much, counsel.
15 Have a nice holiday.

16 (Recess at 12:15 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Linda C. Marshall, RPR
Official Court Reporter

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